TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 164.

W. H. GAZLAY, HANNA F. GAZLAY, HULDA G. MILLER, ET AL., APPELLANTS,

vs.

FLETCHER R. WILLIAMS, TRUSTEE OF HARRY D. BROWN, BANKRUPT.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

FILED DECEMBER 6, 1906.

(20,478.)

(20,478.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 513.

W. H. GAZLAY, HANNA F. GAZLAY, HULDA G. MILLER, ET AL., APPELLANTS,

vs.

FLETCHER R. WILLIAMS, TRUSTEE OF HARRY D. BROWN, BANKRUPT.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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No. 1578.

United States Circuit Court of Appeals, Sixth Circuit.

W. H. GAZLEY, H. F. GAZLEY, HULDA G. MILLER, EMMA G. DONALDSON, JULIA G. STEWART and CLARA G. KUHN, Appellants,
vs.
FLETCHER R. WILLIAMS, Trustee in Bankruptcy of HARRY D. BROWN, Appellee.

Appeal from the District Court of the United States for the Southern District of Ohio.

Record.

Original Transcript Filed June 8, 1906.

1 *Transcript of Record.*

THE UNITED STATES OF AMERICA,
Southern District of Ohio, Western Division, ss:

At a stated term of the District Court of the United States of America, within and for the Western Division of the Southern District of Ohio, in the Sixth Judicial Circuit of the United States of America, begun and held in the court rooms at the city of Cincinnati, Ohio, in said district, on the first Tuesday of April, it being also the third day of that month, in the year of our Lord one thousand nine hundred and sixth, and the one hundred and thirtieth year of the Independence of the United States of America.

Present, the Honorable Albert C. Thompson, District Judge. Among the proceedings had were the following, to-wit:

No. 3775. In Bankruptcy.

EMIL HUTTENBAUER ET AL., Plaintiffs,
vs.
HARRY D. BROWN, Defendant.

Be it remembered, that heretofore, to-wit, on the first day of March, at 4 o'clock P. M., in the year of our Lord one thousand nine hundred and six, there was filed in the Clerk's office of the court aforesaid, the following application of the trustee to bring in additional and necessary parties, which said application is clothed in the words and figures following, to-wit:

Application of the Trustee to Bring in Additional and Necessary Parties.

United States District Court, Southern District of Ohio, Western Division.

No. 3775.

EMIL HUTTENBAUER ET AL., Plaintiffs,
vs.
HARRY D. BROWN, Defendant.

Application of the Trustee to Bring in Additional and Necessary Parties.

Now comes Fletcher R. Williams, the duly appointed and qualified trustee herein, and presents to the court that it is necessary for the complete determination of matters in controversy herein that certain parties, to-wit, The Triumph Electric Company and
2 The Christian Moerlein Brewing Co., The National Elevator Co., The William T. Johnston Co., The Lavercombe Gas & Electric Fixture Co., The Lynn Filter Mfg. Co., all corporations under the laws of Ohio, Love & Roth, a partnership, and Thomas H. Winston, Frederick A. Lavercombe, William G. Reuter, Christian C. Weber, William H. Gazley, Hannah F. Gazley, Hulda G. Miller, Emma G. Donaldson, Julia G. Stewart and Clara G. Kuhn, Elwin K. Stewart and Oscar W. Kuhn, and that the trustee herein finds it necessary to sell the lease-hold estate herein set forth, and that the foregoing above-named parties assert claims adverse to the interest of the trustee in said estate and that said named parties should be brought in and be made party to proceedings in bankruptcy herein.

The said trustee further represents that there has been delivered to and that there is held by him a lease-hold estate on the property, located as follows, to-wit:

"being property situate at the southeast corner of Vine Street and Thorpe Alley, being numbers 524, 526 and 528 Vine Street, Hamilton County, Ohio,

Commencing at a point where the south line of Thorpe Alley intersects Vine Street, being the southwest corner of the building on the premises hereby leased; thence southwardly on the east side of Vine Street 53½ feet more or less to the north line of Francis Seifert's property; thence eastwardly on a line dividing the lots of Siefert and lessors about 100 feet; thence north about four feet, thence east along said dividing line about 76 feet to the west line of Lodge Alley; thence north along the west line of Lodge Alley about 47½ feet to the south line of said Thorpe Alley about 176 feet to the East line of Vine Street and the place of beginning,"

being the same leasehold estate and property formerly held and occupied by the bankrupt, Harry D. Brown, in the conduct and operation of his business prior to the proceedings in bankruptcy herein,

by virtue of a leasehold from William H. Gazley *et al.* to Joseph Kueney, duly recorded in Volume 123, page 439, Hamilton County Land Records of leases and duly transferred and assigned to the said Harry D. Brown, bankrupt.

Said trustee further represents that the foregoing and above named parties claim an interest in said leasehold estate adverse to the trustee herein and that it is necessary for the complete determination of the said matters in controversy that the said foregoing and above named parties be brought in and be made parties hereto, and the said trustee asks that they be compelled to set up their interests in said leasehold estate, or that they be forever barred from asserting same.

Wherefore, the said Fletcher R. Williams, trustee, prays that summons issue to the above named parties and that they be compelled to answer and set up their interests in the said leasehold estate described, and further prays for such other and necessary relief as the nature of the premises may require.

FLETCHER R. WILLIAMS, *Trustee.*

STATE OF OHIO, *Hamilton County, ss:*

Personally appeared before me, Fletcher R. Williams, who being first duly sworn says that he is the duly elected and qualified trustee herein, that his foregoing application is in all respects true as he verily believes.

FLETCHER R. WILLIAMS.

Sworn to before me and subscribed in my presence this 28th day of February, A. D. 1906.

[SEAL.] THOS. L. POGUE.

Notary Public, in and for Hamilton County, Ohio.

And afterwards, to-wit, on the 19th day of March, at 11:30 o'clock A. M., A. D. 1906, the following motion to dismiss W. H. Gazley *et al.*, was filed in the Clerk's Office of the court aforesaid, which said motion is clothed in the words and figures following, to-wit:

Motion to Dismiss W. H. Gazley et al.

UNITED STATES OF AMERICA,
Southern District of Ohio, Western Division:

In Bankruptcy.

EMIL HUTTENBAUER ET AL.,
vs.
HARRY D. BROWN, a Bankrupt.

Now come William H. Gazlay, Hannah F. Gazlay, Hulda G. Miller, Emma G. Donaldson, Julia G. Stewart, Clara G. Kuhn, Elwin K. Stewart and Oscar W. Kuhn, made parties to this proceed-

ing, and not intending to enter their appearance herein, but appearing only for the purpose of this motion, moves the court to dismiss them from this proceeding on the ground that this court has no jurisdiction over their persons or the subject matter of the controversy between the trustee in bankruptcy herein and them.

OSCAR W. KUHN,
Attorney for said Defendants.

And afterwards, to-wit, on the 21st day of March, A. D. 1906, an entry was made upon the journal of the court aforesaid, which said entry is clothed in the words and figures, following, to-wit:

Entry—Journal I, page 5.

Application and Motion Sent to Referee.

4 Upon the application of the trustee herein for a hearing on the motion of Emma Donaldson *et al.*, by Oscar Kuhn, their attorney, as to jurisdiction of the court herein the court directs that said motion and the application of the trustee to make parties hereto and all papers and the subpœnas and returns thereon be sent to the referee in this cause for hearing and report thereon.

And afterwards, to-wit, on the 11th day of April, A. D. 1906, an entry was made by the referee herein, which said entry together with his certificate was filed in the Clerk's Office of the Court aforesaid, on the 15th day of May, at 9 o'clock A. M., A. D. 1906, clothed in the words and figures, following, to-wit:

Entry—Overruling Motion to Dismiss for Want of Jurisdiction.

United States District Court, Southern District of Ohio, Western Division.

In Bankruptcy. No. 3775.

EMIL HUTTENBAUER ET AL., Plaintiffs,
vs.
HARRY D. BROWN, Defendant.

Entry Overruling Motion to Dismiss for Want of Jurisdiction.

This cause coming on to be heard upon the motion of William H. Gazlay, Hannah F. Gazlay, Hulda G. Miller, Emma G. Donaldson, Julia G. Stewart, Clara G. Kuhn, Elwin K. Stewart and Oscar W. Kuhn to dismiss them from this proceeding on the ground that the court herein has no jurisdiction over their person or the subject matter in controversy between the trustee herein and the said parties above named, and the said motion having been referred to the referee herein, the said referee on consideration thereof after argu-

ment of counsel thereon for the trustee and the parties so moving to be dismissed and being fully advised in the premises, does overrule said motion, to which ruling of the court the said parties above named, to-wit: William H. Gazlay, Hannah F. Gazlay, Hulda G. Miller, Emma G. Donaldson, Julia G. Stewart, Clara G. Kuhn, Elwin K. Stewart and Oscar W. Kuhn do hereby except.

And leave is hereby granted the said named parties to plead herein forthwith without prejudice to their rights reserved in said motion.

CHARLES T. GREVE,
Referee in Bankruptcy.

Cincinnati, April 11, 1906.

And afterwards, to-wit, on the 13th day of April, at 4.05 P. M., A. D. 1906, the following answer of W. H. Gazlay *et al.*, was filed in the Clerk's Office of the court aforesaid, which said answer is clothed in the words and figures following, to-wit:

Answer of W. H. Gazlay et al.

United States District Court, Southern District of Ohio, Western Division. In Bankruptcy.

EMIL HUTTENBAUER ET AL., Plaintiffs,
vs.
HARRY D. BROWN, Defendant.

Answer of W. H. Gazlay *et al.*

Now comes the defendants, W. H. Gazlay, Hulda G. Miller, Emma G. Donaldson, Julia G. Stewart and Clara G. Kuhn, made parties hereto, and without intending to enter their appearance herein but acting under protest and the direction of the court, file this their answer herein, and say:

That on or about the — day of July, 1902, they entered into an agreement of lease with one J. D. Kueny whereby they leased to the said J. D. Kueny the premises described in the application herein for a period of ten years from and after July 1st, 1902; that said lease contains the condition, among others, that if said lessee should assign the lease or underlet said leased premises or any other part thereof, or if said lessee's interest therein should be sold under execution or other legal process without the written consent of said lessors, their heirs or assigns first had; or if said lessee or assigns should fail to keep any of the other covenants of the lease by lessee to be kept, it should be lawful for said lessors, their assigns or heirs, into said premises to re-enter and the same to have again, repossess and enjoy, as in the first and former estate; and thereupon this lease and everything therein contained on said lessors' behalf to be done and performed, should cease, determine and be utterly void. They further say that said lease and the premises thereby leased passed into the possession of Harry D. Brown, the bankrupt herein, without the

written consent of said lessors, but with their acquiescence only and that said condition in said lease is still in full force and effect as against said Harry D. Brown and his trustee in bankruptcy herein. That at the time of the filing of the application herein so far as they know or are informed the said lessors had no claim in said leasehold premises adverse to said trustee in bankruptcy and therefore pray to be hence dismissed with their costs.

OSCAR W. KUHN,
Attorney for W. H. Gazlay et al.

STATE OF OHIO, *Hamilton County, ss:*

6 W. H. Gazlay, one of the above named defendants, being first duly sworn, says that the facts and allegations contained in the foregoing pleading are, as he believes, true.

W. H. GAZLAY.

Sworn to before me and subscribed in my presence this 13th day of April, 1906.

[SEAL.] OSCAR W. KUHN,
Notary Public.

And afterwards, to-wit: on the 15th day of May, at 9 o'clock A. M., A. D., 1906, there was filed in the clerk's office of the court aforesaid, the following statement of facts, together with the referee's certificate, which said statement of facts is clothed in the words and figures following, to-wit:

Statement of Facts.

United States District Court, Southern District of Ohio, Western Division.

No. 3775.

EMIL HUTTENBAUER ET AL., Plaintiffs,
vs.
HARRY D. BROWN, Defendant.

Statement of Facts.

It is agreed between all parties hereto that there was executed on or about the 16th day of July, A. D., 1902, a lease between William H. Gazlay, Hannah F. Gazlay, Hulda G. Miller, Emma G. Donaldson, Julia G. Stewart and Clara G. Kuhn, lessors, and Joseph D. Kueny, lessee.

The premises covered by said lease are situated on the east side of Vine street, between Fifth and Sixth streets, in the city of Cincinnati, county of Hamilton, and state of Ohio, and more particularly described in said lease.

The terms of said lease being for ten years from July 7th, 1902, to July 6, 1912, with renewal privilege of ten years, rent seven thousand dollars ($7,000) per annum. Said lease was recorded on September 23, 1902, in lease book No. 123, page 439 of the Hamilton county land records.

It is further agreed that the said lease contains the following terms and stipulations, to-wit:

"Or if said lessee shall assign this lease or underlet said leased premises or any part thereof, or if said lessee's interest therein shall be sold under execution or other legal process, without the written consent of said lessors, their heirs or assigns, is first had; or if said lessee or assigns shall fail to keep any of the other covenants of this lease by said lessee to be kept; it shall be lawful for said lessors their heirs or assigns into said premises to re-enter and the same
7 to have again, re-possess and enjoy as in their first former estate; and thereupon this lease and everything therein contained on the said lessors' behalf to be done and performed, shall cease, determine and be utterly void."

It is further agreed that the lessors in said lease, to-wit: William H. Gazlay, Hannah F. Gazlay, Hulda G. Miller, Emma G. Donaldson, Julia G. Stewart and Clara G. Kuhn, on or about the 9th day of April, A. D., 1904, filed their certain petition in the Superior court of Cincinnati, Hamilton county, state of Ohio, in a suit against Joseph D. Kueny *et al.*, in which the said petitioners, being the lessors in said lease, did ask that a receiver be appointed to take possession, the terms of which petition and prayer thereon are as follows, to-wit:

Plaintiffs further state that the value of the custom and good will of the business conducted on said leased premises, known as "The Majestic Restaurant" would be lost to the creditors. Plaintiffs further state that in order to preserve the liens aforesaid and to protect the lessors as well as the claims of the unsecured creditors of the said Joseph D. Kueny, it is necessary that a receiver or receivers be appointed to take charge of the business conducted by said lessee upon said leased premises until a sale of the same can be made to advantage under and by virtue of the orders of this court.

Wherefore plaintiffs pray that the lien reserved in said lease upon said leased premises be declared to be the first and best lien upon the same; that the amount due the defendant, The Triumph Ice Machine Company be ascertained and be decreed and adjudged to be a lien upon the property known as the "Refrigerating Plant" furnished by said company; that the lien due the defendant, The Brunswick-Balke-Collender Company on the billiard tables and fixtures be ascertained and be decreed to be a lien upon the billiard tables and fixtures connected therewith; that the said leased premises and unexpired term of said lease and the fixtures and personal property contained in said restaurant and saloon be adjudged to be appraised, advertised and sold, free and clear of all claims of all parties to this suit, and said leasehold premises and the unexpired term be sold, subject, however, to the terms, covenants and conditions contained in the lease from said plaintiffs to the said Joseph D. Kueny;

that the moneys arising from the sale of said leased premises and the unexpired term of said lease and said fixtures and chattel property contained in said premises be applied
8 to the payment of the amount found to be due the plaintiffs herein; that the receiver or receivers may be appointed with full power and authority to demand, sue for, collect and take into their possession all the goods, chattels, rights and credits, moneys and effects, books, papers, choses in action, including said leasehold premises; and to sell, convey and assign all of said leasehold premises and the unexpired term thereof."

It is further agreed that in said suit so brought the said Joseph D. Kueny filed his answer entering his appearance and consenting that a receiver be appointed for his property, including said leasehold estate, and that an entry was made appointing receivers in said case, and that the receivers attempted to sell said property at private sale and that an entry was made directing that bids be received to sell same at private sale and that bids were so received unsatisfactory to the court. The court then ordered said property to be sold as a going concern.

It further appears that in the statement of assets and liabilities made by the receivers in said suit, the leasehold estate was valued at $45,000, which statement was filed with the court on May 21st, 1904, and that said property was sold to Harry D. Brown, as in said advertisement set forth, and that a motion to confirm said sale was filed by said receivers and an entry made thereon confirming said sale on July 3, 1905; and that thereafter the said receivers in said suit filed a motion to confirm their report of their receipts and disbursements in the operation and management of said Café property; that thereafter the said Harry D. Brown, the purchaser of said property, in said suit filed a motion for right of possession of said property, claiming that the firm of Straus Brothers & Co. were in possession of certain parts of said leasehold property and withheld same from said purchaser, Harry D. Brown; and that a proper copy of said lease and court proceedings so had is evidenced by exhibits 1 to 16, here*by* attached, and made parts hereof.

It further appears that an entry was made directing that the said property be sold as a going concern, and that an order for such sale was had, and that the proof of publication made under such order of sale shows that the leasehold estate was included in said property so ordered to be sold.

It is further agreed between the parties hereto, that subsequent to the purchase of said property by said Harry D. Brown, that large sums of money, to-wit: about the sum of $20,000, was expended in the improvement of said property.

It is further agreed that after the purchase of said lease-
9 hold estate by Harry D. Brown, that the said Harry D. Brown paid to the said lessors the rents, taxes, insurance, etc., and obligations due and payable on said leasehold estate, as in said lease provided and continued to pay said rents up to and including rent due and payable Jan. 1, 1906.

It is further agreed between the parties hereto that on or about

the 17th day of January, A. D. 1906, a petition was filed by Emil Huttenbauer and others in the United States District Court for the Southern District of Ohio, against Harry D. Brown in bankruptcy, cause 3775, to declare the said Harry D. Brown a bankrupt, and that on the said date, January 17, 1906, one Fletcher R. Williams was duly appointed receiver for the bankrupt estate of said Harry D. Brown and took possession of the said leasehold estate and other properties belonging to said Harry D. Brown, known as the Majestic Café, and continued to operate same as a going concern until on or about the 28th day of February, 1906, when the said Fletcher R. Williams was duly elected trustee by the creditors of the said bankrupt estate, and qualified as such trustee, and took possession of said leasehold property and the other properties of the said bankrupt.

It is further agreed that the said Fletcher R. Williams paid to the said lessors the rent due and payable, February 1, 1906, while he occupied such property as receiver and that he paid to said lessors the rents due and payable March 1st, 1906, and after he had qualified as trustee for said bankrupt estate, and it is further agreed that on March 1st, 1906, that said Fletcher R. Williams, trustee, filed his application asking that said lessors be made parties to the bankruptcy proceedings herein to determine the rights of said lessors in said leasehold estate, and that an order was made on said date, March 1, 1906, directing that subpœna issue to William H. Gazlay *et al.*, making them parties therein, and it is further agreed that said subpœna so issued under said order was received by the marshal of the United States Court for the Southern District of Ohio, Western Division, and for the marshal of New York on the 3rd day of March, 1906, and that service was made on William H. Gazlay, Oscar W. Kuhn, Clara G. Kuhn, and H. F. Gazlay by the marshal of the Southern District of Ohio, March 5, 1906, and on the same date, March 5, 1906, service was made on Hulda G. Miller, —— Stewart, and —— Stewart, her husband, by the marshal for New York, and that Emma G. Donaldson was not served with subpœna until March 9, 1906, and that the rents due and payable to the lessors on March 1st, 1906, *was* paid to them by Fletcher R. Williams on March 6th, 1906.

It is further agreed between the parties hereto that when the said Fletcher R. Williams as receiver under the order of the court in the proceedings in bankruptcy herein took possession of said property and leasehold estate, he stated to Oscar W. Kuhn, the attorney and agent for the lessors, that he desired to sell the said leasehold estate; the said Oscar W. Kuhn, attorney and agent for said lessors, stated to the receiver of the court and to its attorneys, that he would not consent to the sale of said leasehold estate for the benefit of the creditors of the bankrupt, and it is further agreed, that said Oscar W. Kuhn, attorney and agent for said lessors repeated this statement at different times to said receiver and his attorneys, while said receiver was occupying said premises and leasehold estate, both as receiver and after he had been elected and qualified as trustee of said bankrupt estate, and as such trustee had taken possession of said properties and leasehold estate for the benefit of the creditors of the bankrupt,

and which the said trustee held at the time of the filing of the application hereinbefore referred to on March 1, 1906.

It is further agreed between the parties hereto that the receipts for the rents paid by the said receiver and by the said trustee herein, for the rents due and payable February 1st, 1906, and March 1, 1906, were as follows, to-wit:

CINCINNATI, *Feb.* 1, 1906.

Received of F. R. Williams, receiver for H. D. Brown, five hundred and eighty-three and 34-100 dollars for rent of Majestic, No. 524–528 Vine street for one month ending January 31st, 1906.

THE GAZLAY ESTATE,
Per W. H. GAZLAY.

$583.34.

CINCINNATI, *March* 5, 1906.

Received of F. R. Williams, trustee Majestic, five hundred and eighty-three and 34-100 dollars for rent of Majestic No. — Vine street for one month ending February 28, 1906.

THE GAZLAY ESTATE,
Per W. H. GAZLAY.

$583.34.

And afterwards, to-wit: on the same day and at the same hour, there was filed in the clerk's office of the court aforesaid, the following copy of lease, together with the referee's certificate, which said copy of lease is clothed in the words and figures, following, to-wit:

11 *Copy of Lease.*

Lease.

Wm. H. Gazlay *et al.* to Joseph D. Kueny.

Premises: East side Vine bet. 5th & 6th, Cinti., O.

Terms: 10 years July 7th, 1902, to July 6th, 1912. Renewal privilege: 10 years same terms, &c. Rent: $7,000 per annum, $583.34 per month. Recorded, Sept. 23rd, 1902, book 123, page 439.

This lease made this 16th day of July, A. D. 1902, between William H. Gazlay, Hannah F. Gazlay, Hulda G. Miller, Emma G. Donaldson, Julia G. Stewart and Clara G. Kuhn, lessors and Joseph D. Kueny, lessee, witnesseth:

That said lessors in consideration of the rents and covenants hereinafter contained and by said lessee and his assigns to be paid and performed, do hereby grant, devise and lease to the said lessee, his executors, administrators and assigns, the premises situated in the city of Cincinnati in the county of Hamilton and state of Ohio, and described as follows:

Situate on the east side of Vine St. between Fifth and Sixth streets,

commencing at a point where the south line of Thorp alley intersects Vine St. being the northwest corner of the building on the premises hereby leased; thence southwardly on the east side of Vine street fifty-three and one-half (53½) feet more or less to the north line of Francis Siefert's property; thence eastwardly on a line dividing the lots of Siefert's and of said lessors about one hundred (100) feet; thence north about four (4) feet; thence east along said dividing line about seventy-six (76) feet to the west line of Lodge alley, thence north along the west line of Lodge alley about forty-seven and one-half (47½) feet to the south line of Thorp alley, and thence west along the south line of said Thorp alley about one hundred and seventy-six (176) feet to the east line of Vine street and place of beginning.

To have and to hold the same with the appurtenances unto the said lessee, his executors, administrators and assigns from the 7th day of July, A. D., (1902) nineteen hundred and two, for and during the full term of ten years, next ensuing and fully to be completed and ended on the 6th day of July, A. D., 1912, with the right and privilege on the part of the lessee to renew the within lease for a further period of ten years from the 7th day of July, 1912, said renewal term to be fully completed and ended on the 6th day of July, 1922. The terms and conditions of said renewal to be in all respects as the terms and conditions contained in the within lease, and no further instrument shall be necessary to evidence the terms and conditions
12 of said renewal lease upon the exercise of the privilege of renewal by said lessee, his executors, administrators and assigns, but the within instrument is to be considered as embodying all the terms and conditions as evidencing said renewal term upon the exercise of the privilege of said renewal on the part of said lessee, his executors, administrators or assigns.

Yielding and paying therefor, during the said term, or the renewal thereof, the sum of $7,000 per annum, payable in monthly installments of $583.34 each from the 1st day of January, 1903. The first installment of rent to become due and payable on the first day of February, 1903, and a like installment to become due and payable on the first day of each month thereafter during the terms demised and the renewal thereof, but no rent whatever shall be due and payable or collected from the date of this lease up to the first day of January, 1903, lessee to collect the rent from all sub-tenants in said building from and after Jan. 1st, 1903. Provided, however, that if the said rent or any part thereof shall remain unpaid for — days, after it shall become due and without demand made therefor; or if said lessee shall assign this lease or underlet said leased premises or any part thereof, or if said lessee'- interest therein shall be sold under execution or other legal process, without the written consent of said lessors, their heirs, or assigns, is first had; or if said lessee or assigns shall fail to keep any of the other covenants of this lease by said lessee to be kept; it shall be lawful for said lessors their heirs or assigns into said premises to re-enter and the same to have again, repossess and enjoy as in their first and former estate; and thereupon this lease and everything therein contained on the said lessors' behalf

to be done and performed, shall cease, determine and be utterly void.

And said lessee for himself and for his executors, administrators and assigns, covenant- and agree- with said lessors, their heirs and assigns, as follows; that is to say that said lessee will pay said rents, in the manner aforesaid, unless said premises shall be destroyed or rendered untenantable by fire or unavoidable accident; that he will not do or suffer any waste therein; that he will not assign this lease or underlet said premises, nor any part thereof without the written consent of said lessors and that at the end of said term he will deliver up said premises in as good order and condition as they now are or may be put by said lessors' reasonable use and ordinary wear and tear, and damage by fire and other unavoidable casualty excepted; and further that for the said rents to be paid by said lessee and assigns a lien is hereby reserved upon the premises hereby
13 leased, and the interest of said lessee and assigns in and to the same in favor of said lessors, their heirs and assigns, prior and preferable to any and all other liens thereupon whatsoever.

And said lessee for himself and for his executors, administrators and assigns further covenants and agrees with said lessors, their heirs and assigns.

A. To pay all taxes, rates, charges and assessments that may be in any way levied, taxed, rated, charged or assessed upon said premises for the last half of the year 1902, and all succeeding years under this lease or any renewal thereof.

B. To keep the lessee's interest in the within lease, the improvements or fixtures made or placed upon the within premises by the said lessee, his heirs, executors, administrators and assigns, insured to an amount of $—.

C. To pay any increase in the rate of insurance on the buildings standing upon said premises, made necessary or caused by lessee's use or occupancy of same.

And said lessors for themselves, and for their heirs, executors, administrators and assigns, covenant and agree with said lessee, his administrators and executors.

a. That said lessee paying the rents, and observing and keeping the covenants of this lease on his part to be kept, shall lawfully, peaceably and quietly hold, occupy and enjoy said premises, during said term, without any let, hindrance, ejection or molestation by said lessors or their heirs or any person or persons lawfully claiming under them.

b. That said lessee, his heirs, executors, administrators or assigns, shall have the right to make any improvements, repairs or alterations, he or they may deem necessary within or upon the premises hereby demised, provided that no injury be done to said buildings, and provided further that all changes, alterations or improvements shall become a part of the realty as soon as made and belong to the lessors.

c. To keep the roof of said building in repair.

d. To prosecute at their expense the suit now pending in the Superior court of Cincinnati against Eugene L. Lewis, *et als.*, for a reduction of the tax value of the premises hereby demised.

In witness whereof the said parties to these presents have hereunto set their hands the day and year first above written.

Signed and acknowledged in the presence of us:

CLARA S. MILLER,
MARY C. CARTER,

14 As to HANNAH F. GAZLAY,
HULDA G. MILLER,
W. H. GAZLAY,
HANNAH F. GAZLAY,
HULDA G. MILLER,
JULIA G. STEWART,
ELWIN K. STEWART,
EMMA G. DONALDSON,
By W. H. GAZLAY.
JULIA G. STEWART AND
ELWIN K. STEWART,
MARY HAMANT,
EUGENE C. PONEY,
ANDREW DONALDSON,
CLARA G. KUHN,
By W. H. GAZLAY.
OSCAR W. KUHN,
By W. H. GAZLAY.

Witness as to W. H. Gazlay, Emma C. Donaldson and Andrew Donaldson, Clara G. Kuhn and O. W. Kuhn:
SIMEN M. JOHNSON.

JOSEPH D. KUENY.

As to Jos. D. Kueny:
LOUISE K. FOSTER.

STATE OF NEW YORK, *County of Suffolk, ss:*

Be it remembered that on the eleventh day of July, in the year of our Lord one thousand nine hundred and two before me the subscriber a notary public, in and for said county, personally came Hannah F. Gazlay, Hulda G. Miller, Julia G. Stewart, Elwin K. Stewart, the parties named in the foregoing lease and acknowledged the signing thereof to be their voluntary act for the uses and purposes therein mentioned.

In testimony whereof I have hereunto subscribed my name and affixed my notarial seal on the day and year last aforesaid.

[SEAL.] MARY C. CARTER,
Notary Public.

STATE OF OHIO, *County of Hamilton, ss:*

Be it remembered that on the 15th day of July, A. D. 1902, before me the subscriber, a notary public in and for said county personally came W. H. Gazlay; Emma G. Donaldson, Andrew Donaldson, the latter two by W. H. Gazlay, Clara G. Kuhn, and Oscar W. Kuhn,

five of the parties to the foregoing lease, and acknowledged the signing thereof to be their voluntary act for the uses and purposes therein mentioned.

In testimony whereof I have hereunto subscribed my name
15 and affixed my notarial seal on the day and year last aforesaid.

EUGENE C. POCIEY,
Notary Public, Hamilton County, Ohio.

STATE OF OHIO, *Hamilton County, ss:*

Be it remembered that on the 16th day of July in the year of our Lord 1902, before me the subscriber, a notary public, in and for said county personally came Joseph D. Kueny, one of the parties named in the foregoing lease, and acknowledged the signing thereof to be his voluntary act for the uses and purposes therein mentioned.

In testimony whereof I have hereunto subscribed my name and affixed my notarial seal on the day and year aforesaid.

SIMEN M. JOHNSON,
Notary Public, Hamilton County, O.

Transferred in blank.
(Signed) JOSEPH D. KUENY.

Endorsed: Copy of lease. J. D. Kueny. Filed July 3, 1905.

And afterwards, to-wit: but on the same day and at the same hour, there was filed in the clerk's office of the court aforesaid, the following order for sale in Superior court case, marked exhibit 8, together with the referee's certificate, which said order for sale is clothed in the words and figures, following, to-wit:

Order for Sale in Superior Court Case.

Superior Court of Cincinnati.

No. 52409.

W. H. GAZLAY ET AL., Plaintiffs,
vs.
J. D. KUENY ET AL., Defendants.

Entry.

It appearing to the court that the receivers herein gave notice that they would receive bids for the purchase of the Majestic Café as a going concern, in accordance with the order of this court, and that they failed to receive a bid for the purchase of same.

It is therefore considered and ordered by this court that said receivers be and they hereby are authorized and directed to offer the said Café, including the leasehold estate and all the stock fixtures,

etc., used in the prosecution of said business, at public auction on the premises; first as an entirety, and if no bid satisfactory to the said receivers is received that they proceed to sell all of the personal property in possession of said receivers in lots to suit purchasers.

And in selling the above property the said receivers are hereby directed to offer separately,

16 First, the leasehold estate in the property occupied by said Majestic Café, including the cigar store occupied by Strauss Bros. & Company;

Second, the paintings claimed of record by Emery H. Barton.

Third, all the rest and residue of the property in the possesssion of said receivers and used by them in the prosecution of said business, including all stock and merchandise in hand, but excepting cash and outstanding accounts due to the receivers.

It is further ordered that for this purpose they are hereby authorized to employ an auctioneer to auction off all of the property in their possession as receivers of J. D. Kueny, and to expend in extra advertising a sum not to exceed $100 and that they report their proceedings to this court without delay.

And that the terms of the sale are to be cash on the day of the sale.

Endorsed: Entered June 17, 1905.

And afterwards, to-wit, but on the same day and at the same hour, there was filed in the Clerk's Office of the court aforesaid, the following Entry of Superior Court confirming sale, together with the referee's certificate, which said Entry is clothed in the words and figures following, to-wit:

Entry of Superior Court Confirming Sale.

Superior Court of Cincinnati, Ohio.

No. 52409.

W. H. GAZLAY ET AL., Plaintiffs,
vs.
J. D. KUENY ET AL., Defendants.

Entry.

This cause coming on this day to be heard upon the motion of Oscar W. Kuhn and F. L. Emmert, as the duly appointed and qualified receivers of J. D. Kueny, to confirm the sale of all the personal property of said J. D. Kueny, in their possession as such receivers, and to distribute the proceeds derived from said sale, was submitted to the court.

Upon consideration whereof the court find that said proceedings and sale were made in all respects in conformity to law and to the orders of this court, and do therefore hereby approve and confirm

same and do order said Oscar W. Kuhn and F. L. Emmert, as such receivers, to convey and deliver to the purchaser, Harry D. Brown, the properties as purchased by him; and a writ of possession is awarded to put said purchaser in possession of said property.

And as to all questions relating to the distribution of the
17 proceeds of said sale, this cause is continued for further hearing.

Endorsed: No. 52409. Superior Court of Cincinnati, Ohio, W. H. Gazlay, *et al.*, Plaintiffs, *vs.* J. D. Kueny, *et al.*, Defendants.
Entry: Filed July 3, 1905. Pogue & Pogue, Counsellors at Law, 908-909 First National Bank Bldg., Cincinnati, Ohio.

And afterwards, to-wit, on the 14th day of May, A. D. 1906, an entry was made by the referee herein, which said entry, together with the said referee's certificate, was filed in the Clerk's Office of the court aforesaid, on the 15th day of May, at 9 o'clock A. M., and is clothed in the words and figures following, to-wit:

Entry of Referee.

United States District Court, Southern District of Ohio, Western Division.

No. 3775.

EMIL HUTTENBAUER ET AL., Plaintiffs,
vs.
HARRY D. BROWN, Defendant.

Entry.

This cause coming on for further hearing on the application and petition of the trustee in bankruptcy, as to the leasehold estate of the bankrupt, Harry D. Brown, heretofore referred to the undersigned referee, and the answer of William H. Gazlay, Hannah F. Gazlay, Hulda G. Miller, Emma G. Donaldson, Julia G. Stewart and Clara G. Kuhn, the referee, after hearing the adverse interests, on the issues joined, finds that this court has jurisdiction of the matters involved and set forth in the petition and application.

The referee further finds that F. R. Williams, trustee in bankruptcy of the bankrupt, Harry D. Brown, has elected to take said leasehold estate, and is in lawful possession of the same and is entitled to sell said leasehold estate, convert the value thereof into money for the purpose of distributing the money realized from the sale thereof, and free from the claim of the said lessors heretofore named to forfeit said estate by reason of said sale by the trustee or of the proceedings heretofore had herein, and the referee further finds that said trustee aforesaid is entitled to convey said leasehold estate free from the claim of said lessors to forfeit said leasehold by reason

of the bankruptcy of said H. D. Brown or by reason of any sale or assignment of said leasehold property that may be made pursuant to the orders of this court for the purpose of converting said property into assets for distribution, to all of which rulings and orders
18 of the said referee, said lessors, William H. Gazlay, Hannah F. Gazlay, Hulda G. Miller, Emma G. Donaldson, Julia G. Stewart and Clara G. Kuhn hereby except. This cause is reserved for further orders of the referee herein as to all matters not determined herewith.

CHARLES T. GREVE,
Referee in Bankruptcy.

May 14, 1906.

And afterwards, to-wit, on the 14th day of May, A. D. 1906, the following petition of W. H. Gazlay, *et al.*, was filed with the referee herein, which said petition together with the said referee's certificate, was thereupon, on the 15th day of May, at 9 o'clock A. M., A. D. 1906, filed in the Clerk's Office of the court aforesaid, and is clothed in the words and figures following, to-wit:

Petition of W. H. Gazlay, et al., for Review.

In the District Court of the United States for the Southern District of Ohio, Western Division.

Filed May 14, 1906. Charles T. Greve, Referee in Bankruptcy.

In Bankruptcy.

EMIL A. HUTTENBAUER ET AL.,
vs.
HARRY D. BROWN, Bankrupt.

Now come W. H. Gazlay, Hannah F. Gazlay, Hulda G. Miller, Emma G. Donaldson, Julia G. Stewart, Elwin K. Stewart, Clara G. Kuhn and Oscar W. Kuhn, made defendants to the application of the trustee in bankruptcy herein, for an order authorizing him to sell the leasehold estate of said Harry D. Brown in and to the property described in said application, and respectfully file herewith their petition for review of the orders of the referee entered herein on the 11th day of April, 1906, and on the 12th of May, 1906, respectively.

Petitioners respectfully represent that said referee erred.

1st. In overruling their motion to be dismissed as parties defendant to the application of said trustee to sell the leasehold estate in the property therein described, on the ground that the court had no jurisdiction over their persons and that said petitioners had no interest by way of lien or otherwise at the date of said application of which this court could take cognizance.

2nd. In ordering and adjudging that these petitioners had no right to forfeit the lease of said Harry D. Brown in the event of a

sale of same under the application of the trustee in bankruptcy herein, because by the terms of the lease this right was reserved to petitioners as against the original lessee only, and could not
19 be asserted against any other person whatsoever because neither expressly nor impliedly named in said lease.

3rd. In adjudging that these petitioners could not assert said right of forfeiture as against the trustee in bankruptcy herein for the added reason that they had accepted rent from him as such trustee.

4th. In ordering said trustee in bankruptcy herein to sell said leasehold estate in said premises clear and free from any claim or right on the part of the petitioners to forfeit same in event of a sale.

5th. In his conclusions of law from the evidence offered at said hearing.

6th. Wherefore, the said W. H. Gazlay, Hanna F. Gazlay, Hulda G. Miller, Emma G. Donaldson, Julia G. Stewart, Edwin K. Stewart, Clara G. Kuhn and Oscar W. Kuhn respectfully pray that said two orders of the referee entered herein, respectively on the 11th day of April, 1906, and on the 12th day of May, 1906, be reviewed by the Honorable Judge of the District Court of the United States for the Southern District of Ohio, Western Division, and that said orders be adjudged erroneous and void.

OSCAR W. KUHN,
Attorney for Petitioners.

UNITED STATES OF AMERICA,
Southern District of Ohio, Western Division, County of Hamilton, ss:

I, W. H. Gazlay, one of the petitioners mentioned and described in the foregoing petition, do hereby make a solemn oath that the statements therein are true according to the best of my knowledge, information and belief.

W. H. GAZLAY.

Subscribed and sworn to before me this 14th day of May, A. D. 1906.

HENRY BENTLEY,
[SEAL.] *Notary Public, in and for Hamilton County, Ohio.*

40c Due Notary.

And afterwards to-wit, on the 15th day of May, at 9 o'clock A. M., A. D. 1906, the following certificate of referee was filed in the Clerk's Office of the court aforesaid, which said certificate is clothed in the words and figures following, to-wit:

Certificate of Referee on Petition to Review.

United States District Court, Southern District of Ohio, Western Division.

No. 3775. In Bankruptcy.

In re EMIL HUTTENBAUER ET AL.
vs.
HARRY D. BROWN, Bankrupt.

I, Charles T. Greve, one of the referees of said court in
20 bankruptcy, do hereby certify that in the course of the proceedings in said cause, in the matter of the petition of the trustee to make William H. Gazlay, *et al.*, parties to this proceeding and for direction as to the sale of the leasehold estate and also upon the motion of said Wm. H. Gazlay, *et al.*, to dismiss said William H. Gazlay, *et al.*, from this suit, and upon the answer of said William H. Gazlay and others to the petition, a certain entry and order overruling said motion of said William H. Gazlay, *et al.*, was made by the referee on April 11, 1906, to which said William H. Gazlay, *et al.*, then and there excepted, and that thereafter, on May 12, 1906, a certain entry and order was made by the referee as to the issues involved in said petition and said answer, to which entry and order William H. Gazlay and others then and there excepted, which original entries and orders are hereto attached and made a part hereof, and that thereafter said William H. Gazlay, *et al.*, filed with the referee, their petition for review of said entries and orders, setting out the errors complained of, as will appear from said petition which is attached hereto. I therefore certify that the statement of facts hereinafter included and made a part hereof, is the statement of the facts agreed upon between counsel and considered by the referee in forming his judgment, and I certify also that the referee did find from said facts, the following conclusions of law:

First. Where the trustee in bankruptcy is in lawful possession of leasehold premises under a lease which contains certain conditions as to forfeiture, and the lessors maintain that the title of said trustee in bankruptcy and the power of said trustee to sell said property is subject to certain conditions, there is a matter in controversy between said trustee and said lessors and the court in bankruptcy has power to bring in said lessors as parties for the complete determination of said matter.

Second. Where said lease contains a condition, "if said lessee shall assign this lease—, or if said lessee interest therein shall be sold under execution or other legal process without the written consent of said lessors and heirs or assigns is first had," with a proviso for lessor's re-entry in case of breach, said trustee in bankruptcy holds said property with power to sell the same as part of the estate of the bankrupt and reduce the same to money for the purpose of distribution.

Third. Where a lease made to K. contains a condition as set forth in the foregoing paragraph, said condition applies only to the estate of K. and does not affect the estate of any successor in inter-
21 est to K., if said estate of K. has been transferred by legal process upon the application of the lessors and with their consent to said successor in interest.

Fourth. Such conditions as those referred to in the foregoing paragraphs are single and indivisible, and when once broken and the breach is either licensed or waived, the condition is gone forever.

Fifth. Where a lease is made to K, with such conditions as hereinbefore recited, and said lease in the suit of the lessors, is sold at public auction in said proceeding to B, and B thereafter becomes bankrupt, and the trustee in bankruptcy elects to assume and take said leasehold estate as part of the assets of the bankrupt and enters into possession of said leasehold premises, said possession can be only for the purpose of sale and distribution to the creditors of said bankrupt estate.

Sixth. Where said trustee has entered into possession of a leasehold estate as hereinbefore described and has paid rent to the lessors, for said premises as such trustee and said rent has been accepted by said lessors from said trustee in bankruptcy, said lessors are precluded from denying the title of said trustee in bankruptcy, and the right of said trustee in bankruptcy to convert said estate into cash for the purpose of distribution to creditors.

The referee attaches hereto his statement of the reasons which led him to the conclusions hereinbefore set out.

CHARLES T. GREVE.
Referee in Bankruptcy.

Cincinnati, May 14, 1906.

And afterwards, to-wit: on the 31st day of May, 1906, at 11 o'clock A. M., the following reply to F. R. Williams, trustee, was filed in the clerk's office of the court aforesaid, which said reply is clothed in the words and figures following, to-wit:

Reply of F. R. Williams, Trustee.

United States District Court, Southern District of Ohio, Western Division. In Bankruptcy.

EMIL HUTTENBAUER ET AL., Plaintiffs,
vs.
HARRY D. BROWN, Defendant.

Reply of F. R. Williams, Trustee.

Now comes F. R. Williams, trustee of Harry D. Brown, bankrupt, and defendant in this original action, and for reply to the answer of the defendants, W. H. Gazlay, Hulda G. Miller, Emma G. Donaldson, Julia G. Stewart and Clara G. Kuhn, states that he admits "that

on or about the — day of July, 1902, they entered into an
22 agreement of lease with one J. D. Kueny, whereby they leased to the said J. D. Kueny the premises described in the application herein for a period of ten years from and after July 1st, 1902; with privilege of renewal for ten years additional; that said lease contains the condition, among others, that if said lessee should assign the lease or underlet said leased premises or any part thereof, or if said lessee's interest therein should be sold under execution or other legal process without the written consent of said lessors, their heirs or assigns first had; or if said lessee or assigns should fail to keep any of the other covenants of the lease by lessee to be kept it should be lawful for said lessors, their heirs or assigns, into said premises to re-enter and the same to have again, repossess and enjoy as in the first and former estate; and thereupon this lease and everything therein contained in said lessors' behalf to be done and performed, should cease, determine and be utterly void."

Said trustee further states that on the 9th day of April, 1904, the aforesaid defendants, the original lessors, filed a suit in the Superior Court of Cincinnati, Hamilton county, Ohio, No. 52409, wherein they sought to sell the leasehold estate of Jos. D. Kueny, the original lessee; that as a result of the said proceedings receivers were appointed who held the said property until the 24th day of June, 1905, when after various attempts had been made to sell the leasehold estate of Jos. D. Kueny at private sale, the property was put up and sold at public auction, without limit or reserve, and the said property was bid in by Harry D. Brown, the bankrupt herein, and that said trustee further says that the said Harry D. Brown paid rent to these defendants and continued to so pay rent until he was adjudged a bankrupt in these proceedings herein; that F. R. Williams was duly appointed receiver to hold the property of the said bankrupt until a trustee could be elected; that as said receiver on the — day of February, 1906, he paid rent to the said W. H. Gazlay for said lessors as receiver of the said Harry D. Brown, bankrupt, the said W. H. Gazlay being one of said lessors; that on the 27th day of February, 1906, at a creditors' meeting of the said Harry D. Brown, bankrupt, the said F. R. Williams was elected trustee of the said Harry D. Brown, bankrupt, and that before March 1st, 1906, he instituted proceedings in this cause, which are shown in the application filed herein to have his rights in the said property determined; that after instituting said proceedings summons had been served on all the answering defendants, save one, who was a non-resident of
23 the state of Ohio; there was paid by him as such trustee to the same W. H. Gazlay, agent for all the other answering defendants lessors, the rent for the month of February, 1906; that said rent was received by said W. H. Gazlay for all the said lessors; that he holds the same and that neither the same nor any part thereof has been refunded to the trustee herein.

Wherefore this said trustee now prays, that having fully replied to the answer of the said lessors that the relief prayed for in his original petition may be granted.

——— ———,
Attorneys for F. R. Williams, Trustee of Harry D. Brown, Bankrupt.

STATE OF OHIO, *Hamilton County, ss:*

F. R. Williams, being first duly sworn, says that he is the trustee of Harry D. Brown, bankrupt, and that the facts set forth in the foregoing reply are true as he verily believes.

F. R. WILLIAMS.

Sworn to before me and subscribed in my presence this 29th day of May, A. D., 1906.

J. W. CURTIS,

[SEAL.] *Notary Public, in and for Hamilton County, Ohio.*

40c paid by Pogue & Pogue.

And afterwards, to-wit: on the 31st day of May, A. D., 1906, at 12:30 o'clock P. M., the following memorandum of Judge Thompson was filed in the clerk's office of the court aforesaid which said memorandum is clothed in the words and figures, following, to-wit:

Memorandum of Judge Thompson.

United States District Court, Southern District of Ohio, Western Division.

In Bankruptcy. No. 3775. Mem.

EMIL HUTTENBAUER ET AL.
vs.
HARRY D. BROWN.

Petition for Review.

The lease provides that—"If said lessee interest therein shall be sold under execution or other legal process, without the written consent of said lessors, their heirs or assigns, is first had * * * it shall be lawful for said lessors, their heirs or assigns, into said premises to re-enter, and the same to have again re-possess and enjoy as in their first and former estate."

The lease further provides that—"A lien is hereby reserved upon the premises hereby leased, and the interest of said lessee and assigns in and to the same, in favor of said lessors, their heirs and
24 assigns, prior and preferable to any and all other liens thereupon whatsoever."

Kueny, the lessee, became insolvent and thereupon the lessors brought a suit in the Superior Court of Cincinnati, Hamilton county, Ohio, to enforce said lien for non-payment of rent, and under a decree of said court in said suit the leasehold estate of said Kueny in the property was sold to Brown without any reservation whatever.

Afterwards, Brown became insolvent, and in a proceeding instituted in this court by his creditors, he was adjudged a bankrupt and his property, including the leasehold estate, was placed in the hands

of a receiver, and afterwards, in the hands of a trustee elected by the creditors under the provisions of the bankrupt law.

Pending this proceeding, and on the first day of February, 1906, W. H. Gazlay, one of the lessors and agent for his co-lessors, to collect the rent, accepted and received from the receiver the rent due under the lease for the month of January, 1906; and afterwards, on the 5th day of March, 1906, accepted and received from the trustee the rent due under the lease for the month of February, 1906.

March 1st, 1906, the trustee, with a view to the sale of the leasehold, filed a petition herein, bringing in parties claiming to have liens, etc., upon said leasehold estate, and among others, the lessors who are now asserting the right, in event of a sale thereof, to re-enter and take possession of said property, under the forfeiture clauses of the lease hereinbefore set forth, and the trustee seeks to have the title to said leasehold, which was vested in him by the operation of the bankrupt law, quieted, against the said claims of the said lessors.

March 3d, 1906, the lessors, Hulda G. Miller and Julia G. Stewart, were duly served with process. On the 5th of March, 1906, the lessors, William H. Gazlay, Hannah F. Gazlay and Clara G. Kuhn, were duly served with process, and on the 9th of March, 1906, Emma G. Donaldson was also served with process—all being served before the February installment of rent was paid, except Emma G. Donaldson.

1. The court has jurisdiction to bring in the lessors and all persons claiming to have any estate or interest in, or lien upon the leasehold, and to require them to set up their claims for adjudication, with a view to the sale or other disposition of the property to the best advantage of all concerned.

(Bankrupt Law, Sec. 2, Paragraphs 6, 7 and 15.)

2. Did the lessors waive the right to enforce the forfeiture clauses by accepting and receiving rent from the receiver and from the trustee?

Knowledge of the proceeding in bankruptcy would be notice to the lessors that upon the adjudication of Brown as a bankrupt, the title to, and the right to the possession of the leasehold, would pass from Brown to the trustee in bankruptcy, and the acceptance of the rent with such knowledge and notice would be an acquiescence in the transfer, and a waiver of the right to enforce the forfeiture.

William H. Gazlay, one of the lessors, was the agent of his co-lessors to collect the rent, and with full knowledge of the terms and conditions of the lease and of the forfeiture clauses thereof, collected the rent from the receiver and the trustee, for the months of January and February, 1906; but it is not shown that he was authorized to waive the forfeiture, or that his co-lessors had knowledge of the pendency of the proceedings in bankruptcy, or of the collection of the rents from the receiver and trustee, prior to the service of process upon them in this proceeding; and the defendant, Emma G. Donaldson, was not served until six days after the payment of the February instalment of the rent, and her right to enforce the for-

feiture has not been waived by her agent's acceptance of the payment of rent by the trustee.

3. The doctrine of Dumper's Case, 4th Coke, 119, in the absence of statutory provisions to the contrary, is applicable here, and it follows that the lessors set the leasehold free from the operation of the forfeiture clauses when, at their instance, it was sold tc Brown "under legal process" issued by the Superior Court of Cincinnati, and it may be noted that that court did not direct or require that it be sold subject to the terms, covenants and conditions of the lease, as prayed for in the petition.

4. It is conceded, by counsel for the lessors, that the legal title and right to the possession of the leasehold estate, by operation of the Bankrupt Law, passed to and vested in the trustee in bankruptcy, in trust for the creditors of the bankrupt, free from the operation of the forfeiture clauses of the lease, and it follows that a sale of the leasehold by the trustee would not convey to the purchaser any interest or property right of Brown, his interest therein, as lessee, having heretofore been transferred to the trustee by operation of law, and against which transfer no provision had been made in the forfeiture clauses of the lease. A sale under "legal process" means a sale made in obedience to a writ issued or an order or a decree made by a court of competent jurisdiction, and the
26 phrase "legal process," can not be construed to mean or include a transfer of the title to property by operation of law. *In re* Ells, 98 Fed., 967, the forfeiture clause of the lease providing that

"If the estate hereby created shall be taken on execution or by other process of law, or if the lessee, or his executors, administrators or assigns, shall be declared bankrupt, or insolvent according to law, or if any assignment shall be made of his or their property for the benefit of creditors, then and in any of the said cases (notwithstanding any license of any former breach of covenant, or waiver of the benefit hereof or consent in a former instance) the lessors or their successors, heirs or assigns, lawfully may, immediately or at any time thereafter, and without demand or notice, enter into and upon the said premises, or any part thereof, in the name of the whole, and repossess the same as of their former estate," etc.

And the lessee having been adjudicated a bankrupt, the forfeiture was enforced; but here, the right and title of Brown to the leasehold was not sold or transferred to the trustee under "legal process," and if hereafter sold by the trustee under "legal process," it will not convey any title, or interest of Brown therein, but will convey to the purchaser the title vested in the trustee by operation of the Bankrupt Law. (Bankrupt Law, Sec. 70, Paragraphs *a* and *c*.)

The purchaser will take title from the trustee and not from Brown.

The findings and order of the referee will be affirmed.

And afterwards, to-wit, on the 2nd day of June, A. D. 1906, at 10 o'clock A. M., an entry was made upon the journal of the court

aforesaid, which said entry is clothed in the words and figures following, to-wit:

Entry: Journal I, page 83.

Decree.

This cause coming on to be heard on the petition of W. H. Gazlay, Hulda G. Miller, Emma G. Donaldson, Julia G. Stewart and Clara G. Kuhn, for review of the orders of court entered herein by Charles T. Greve, one of the referees of this court, on an application filed by the trustees of the bankrupt, F. R. Williams, to have said W. H. Gazlay, Hulda G. Miller, Emma G. Donaldson, Julia G. Stewart and Clara G. Kuhn, petitioners herein, and others appear and assert what claim, if any, they have to the property described in said application, the motion of said petitioners, answer of said petitioners, the reply of the said trustee, the certificate of the
27 referee and the evidence, and the court being fully advised, delivered a written opinion, which was filed herein on the 31st day of May, 1906, and in pursuance of said written opinion it is considered, ordered and decreed by the court that orders of the referee are hereby confirmed and a petition for review filed by W. H. Gazlay, Hulda G. Miller, Emma G. Donaldson, Julia G. Stewart and Clara G. Kuhn, on the — day of May, 1906, is dismissed at the cost of said petitioners. To which action of the court the said W. H. Gazlay, Hulda G. Miller, Emma G. Donaldson, Julia G. Stewart and Clara G. Kuhn, the petitioners herein, except.

And afterwards, to-wit, on the 6th day of June, A. D. 1906, at 1:30 o'clock P. M., the following petition for appeal of W. H. Gazlay, *et al.*, was filed in the Clerk's Office of the court aforesaid, which said petition for appeal is clothed in the words and figures following, to-wit:

Petition for Appeal of W. H. Gazlay et al.

In the District Court of the United States for the Southern District of Ohio, Western Division. In Bankruptcy.

EMIL A. HUTTENBAUER ET AL.
vs.
HARRY D. BROWN, Bankrupt.

Petition on Appeal of W. H. Gazlay, Hanna F. Gazlay, Hulda G. Miller, Emma G. Donaldson, Julia G. Stewart, and Clara G. Kuhn.

The above named W. H. Gazlay, Hanna F. Gazlay, Hulda G. Miller, Emma G. Donaldson, Julia G. Stewart and Clara G. Kuhn, considering themselves aggrieved by the judgment made and entered on the 2nd day of June, 1906, in the above entitled cause, do hereby appeal from said judgment to the United States Circuit Court

of Appeals for the Sixth District, for the reason specified in the assignment of errors which is filed herewith, and they pray that this appeal may be allowed and that a transcript of the record, proceedings and papers upon which said judgment was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Sixth District.

OSCAR W. KUHN,
Attorney for Appellants.

The foregoing claim of appeal is allowed. Appeal bond, $200.00.

J. K. RICHARDS,
U. S. Circuit Judge.

June 6, 1906.

28 And afterwards, to-wit, but on the same day and at the same hour, the following assignment of errors of W. H. Gazlay, *et al.*, was filed in the Clerk's Office of the court aforesaid, which said assignment of errors is clothed in the words and figures following, to-wit:

Assignment of Errors of W. H. Gazlay et al.,

In the District Court of the United States for the Southern District of Ohio, Western Division. In Bankruptcy.

EMIL A. HUTTENBAUER ET AL.
vs.
HARRY D. BROWN, Bankrupt.

Assignment of Errors of W. H. Gazlay *et al.*

Now come W. H. Gazlay, H. F. Gazlay, Hulda G. Miller, Emma G. Donaldson, Julia G. Stewart and Clara G. Kuhn, the appellants herein, and having asked for an allowance of an appeal from the decree herein against them, assign for errors in said decree and the proceedings of the court therein the following:

First. That the court erred in finding and decreeing that the petition of the said W. H. Gazlay, *et al.*, to review the findings and orders of the referee herein should be dismissed.

Second. That the court erred in affirming the order of the referee herein overruling the motion of said W. H. Gazlay, *et al.*, to be dismissed as parties defendant to the application of the trustee in bankruptcy to sell the leasehold estate of Harry D. Brown in the property described therein on the grounds that the court had no jurisdiction over their persons and that said W. H. Gazlay, *et al.*, had no interest in said leasehold estate by way of lien at the date of said application of which this court could take cognizance.

Third. That the court erred in affirming the finding of the referee herein that appellants had no right to forfeit the lease of said Harry D. Brown in the event of a sale of same under the application of the trustee in bankruptcy herein, because by the terms

of said lease this right was reserved to appellants as against the original lessee only, and could not be asserted against the trustee in bankruptcy nor any other person whatsoever, because they were neither expressly nor by implication named in said lease.

Fourth. That the court erred in affirming the finding of the referee herein that appellants could not assert said right of forfeiture as against the trustee in bankruptcy herein, for the reason that they had accepted rent from him as such trustee, thereby waiving any right they may have had to forfeit said lease.

Fifth. That the court erred in affirming the finding of
29 the referee herein that appellants could not assert said right of forfeiture as against the trustee in bankruptcy herein because by their proceedings in the Superior Court of Cincinnati against J. D. Kueny, the original lessee of the said premises, under which proceedings the said leasehold estate was sold to the said Harry D. Brown, they had forever discharged the lease from the condition providing for a forfeiture of the lease in case said leasehold interest should be sold on execution or other legal process without the written consent of the lessors, the appellants herein.

Sixth. That the court erred in affirming the finding of the referee herein that the trustee in bankruptcy was entitled to sell said leasehold estate clear and free from any claim or right on the part of appellants to forfeit same in the event of a sale.

Seventh. That the court erred in affirming the referee's conclusions of law from the agreed statement of facts.

Wherefore these appellants pray that the finding and decree of the court against them be reversed and held for naught and that the court may be directed and ordered to enter such a decree as is proper.

OSCAR W. KUHN,
Solicitor for Appellants.

And afterwards, to-wit: on the 6th day of June, A. D., 1906, at 4 o'clock P. M., the following appeal bond was filed in the clerk's office of the court aforesaid, which said appeal bond is clothed in the words and figures, following, to-wit:

Appeal Bond.

Know all men by these presents, That we, W. H. Gazlay, H. F. Gazlay, Hulda G. Miller, Emma G. Donaldson, Julia G. Stewart and Clara G. Kuhn, as principal, and Karl H. Caldwell as sureties, are held and firmly bound unto Fletcher K. Williams, trustee in bankruptcy of Harry P. Brown, a bankrupt, in the full and just sum of two hundred dollars, to be paid to the said Fletcher R. Williams, trustee as aforesaid, certain attorneys, executors, administrators or assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated this sixth day of June, in the year of our Lord one thousand nine hundred and six.

Whereas, lately at a session of the district court of the United States for the Southern District of Ohio, Western Division, in a suit depending in said court, between Emil A. Huttenbauer and others as plaintiffs and Harry D. Brown, defendant, a decree was rendered against the said W. H. Gazley, H. F. Gazley, Hulda G. Miller, Emma G. Donaldson, Julia G. Stewart, and Clara G. Kuhn, and the said W. H. Gazley, H. F. Gazlay, Hulda G. Miller, Emma G. Donaldson, Julia G. Stewart and Clara G. Kuhn having obtained an appeal and filed a copy thereof in the clerk's office of the said court to reverse the decree in the aforesaid suit, and a citation directed to the said Fletcher R. Williams, trustee, as aforesaid, citing and admonishing him to be and appear at a session of the United States Circuit Court of Appeals for the sixth circuit, to be holden at the city of Cincinnati, in said circuit, on the fifth day of July next.

Now the condition of the above obligation is such, that if the said W. H. Gazlay, H. F. Gazlay, Emma G. Donaldson, Julia G. Stewart and Clara G. Kuhn, shall prosecute their appeal to effect, and answer all damages and cost if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

W. H. GAZLEY, [SEAL.]
H. F. GAZLAY, [SEAL.]
HULDA G. MILLER, [SEAL.]
EMMA G. DONALDSON, [SEAL.]
JULIA G. STEWART, [SEAL.]
CLARA G. KUHN, [SEAL.]
By OSCAR W. KUHN, *Att'y.* [SEAL.]
KARL H. CALDWELL. [SEAL.]

Sealed and delivered in presence of
ROB'T C. GEORGI,
As to Karl H. Caldwell only.

Approved by
J. K. RICHARDS,
U. S. Circuit Judge.

June 6, '06.

THE UNITED STATES OF AMERICA,
Southern District of Ohio, Western Division, ss:

I, Benjamin R. Cowen, clerk of the District court of the United States of America, within and for the district and division aforesaid, do hereby certify that the foregoing is a true and complete transcript of the controversy had between Fletcher R. Williams, trustee, and William H. Gazlay, *et al.*, in the above entitled cause, as the same appears of record and on file in the clerk's office of said court.

In witness whereof, I have hereunto set my hand and affixed the

seal of said court, at the city of Cincinnati, Ohio, this 8th day of June, A. D., 1906.

B. R. COWEN, *Clerk,*
[SEAL.] By ROB'T C. GEORGI,
Deputy Clerk.

31 United States Circuit Court of Appeals for the Sixth Circuit.

UNITED STATES OF AMERICA, *Sixth Judicial Circuit, ss:*

To Fletcher R. Williams, trustee in bankruptcy of Harry P. Brown, a bankrupt, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Sixth circuit, to be holden at the city of Cincinnati, in said circuit, on the * fifth day of July next, pursuant to a petition for appeal filed in the clerk's office of the District court of the United States for the Southern District of Ohio, Western Division, wherein W. H. Gazlay, H. F. Gazlay, Hulda G. Miller, Emma G. Donaldson, Julia G. Stewart and Clara G. Kuhn are appellants, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellants as in the said petition for appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, chief justice of the United States, this sixth day of June, in the year of our Lord one thousand nine hundred and six, and of the Independence of the United States of America the one hundred and thirtieth.

J. K. RICHARDS,
U. S. Circuit Judge.

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* Not exceeding 30 days from the day of signing.

Cincinnati, O., June 6, 1906.

Service of the within process is hereby waived and appearance entered for all purposes as fully as if served with a copy of said citation.

FLETCHER R. WILLIAMS, *Trustee,*
By POGUE & POGUE, *Att'ys of Record.*

No. 3775. Bankruptcy. United States District Court, Southern District of Ohio, Western Division. Emil Huttenbauer, *et al., vs.* Harry D. Brown. Citation. Filed June 8, 1906, at 9 o'clock. B. R. Cowen, Clerk.

32 United States Circuit Court of Appeals for the Sixth Circuit.

And afterwards, to-wit: on the 15th day of June, A. D., 1906, an entry was made on the journal of said court clothed in the words and figures as follows, to-wit:

Journal C, Page 301.

No. 1578.

W. H. GAZLEY ET AL.
vs.
FLETCHER R. WILLIAMS, Trustee.

Before Lurton and Severns, C. JJ., and Cochran, D. J.

This cause is submitted on briefs without oral argument.

And afterwards, to-wit: on the 16th day of June, A. D. 1906, a decree was entered in said cause clothed in the words and figures as follows, to-wit:

Journal C, Page 302.

United States Circuit Court of Appeals for the Sixth Circuit.

No. 1578.

W. H. GAZLEY, H. F. GAZLEY, HULDA G. MILLER, EMMA G. DONALDSON, JULIA G. STEWART, and CLARA G. KUHN, Appellants,
vs.
FLETCHER R. WILLIAMS, Trustee in Bankruptcy of Harry Brown, Appellee.

Appeal from the District Court of the United States for the Southern District of Ohio.

33 This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Ohio, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court, in this cause be and the same is hereby affirmed with costs.

And afterwards, to-wit: on the 30th day of July, A. D. 1906, an opinion was filed in said cause clothed in the words and figures as follows to-wit:

Opinion.

34 Filed Jul- 30, 1906. Frank O. Loveland, Clerk.

No. 1578.

United States Circuit Court of Appeals, Sixth Circuit.

W. H. GAZLAY, H. F. GAZLAY, HULDA G. MILLER, EMMA G. DONALDSON, JULIA G. STEWART, and CLARA G. KUHN, Appellants,

vs.

FLETCHER R. WILLIAMS, Trustee in Bankruptcy of Harry D. Brown, Appellee.

Appeal from the District Court of the United States for the Southern District of Ohio.

Submitted June 15, 1906; Decided July 16, 1906.

Before Lurton and Severens, Circuit Judges, and Cochran, District Judge.

COCHRAN, District Judge, delivered the opinion of the court:

This appeal involves a controversy which arose in the course of the involuntary proceeding in bankruptcy against one Harry D. Brown, pending in the lower court. It is a controversy between the appellee, his trustee in said proceeding, and the appellants, who are lessors in a certain lease under which, at the time of the institution of said proceeding, said bankrupt held a certain leasehold estate.

The lease covered certain premises on the east side of Vine street, between Fifth and Sixth streets, Cincinnati, Ohio, known as the Majestic Café. It was executed July 16, 1902, was for a period of ten years from July 7, 1902, with the privilege of renewal for an additional ten years, and was upon an annual rental of $7,000,
35 payable monthly, to secure payment of which a lien was retained in the lease on the leasehold estate thereby granted. The original lessee was one Joseph D. Kueny, and the bankrupt acquired the leasehold estate by purchase at a judicial sale in a suit brought by appellants, lessors in said lease, against said Kueny in the Superior Court of Cincinnati to enforce said lien. Suit was brought April 9, 1904, and the sale was had and confirmed in June and July, 1905. Pending the suit the premises were in charge of a receiver. The petition in said suit sought a sale of the leasehold estate, "subject to the terms, covenants and conditions contained" in said lease, but the order of sale and confirmation contained no such provision. Said Brown, immediately upon his purchase, entered into possession, made extensive improvements on the property and paid the rent regularly until January 1, 1906. On January 17, 1906, said bankruptcy proceedings were instituted against him and on same date the appellee, Fletcher R. Williams, was appointed receiver therein. An

Journal C, Page 301.

No. 1578.

W. H. GAZLEY ET AL.
vs.
FLETCHER R. WILLIAMS, Trustee.

Before Lurton and Severns, C. JJ., and Cochran, D. J.

This cause is submitted on briefs without oral argument.

And afterwards, to-wit: on the 16th day of June, A. D. 1906, a decree was entered in said cause clothed in the words and figures as follows, to-wit:

Journal C, Page 302.

United States Circuit Court of Appeals for the Sixth Circuit.

No. 1578.

W. H. GAZLEY, H. F. GAZLEY, HULDA G. MILLER, EMMA G. DONALDSON, JULIA G. STEWART, and CLARA G. KUHN, Appellants,
vs.
FLETCHER R. WILLIAMS, Trustee in Bankruptcy of Harry Brown, Appellee.

Appeal from the District Court of the United States for the Southern District of Ohio.

33 This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Ohio, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court, in this cause be and the same is hereby affirmed with costs.

And afterwards, to-wit: on the 30th day of July, A. D. 1906, an opinion was filed in said cause clothed in the words and figures as follows to-wit:

Opinion.

34 Filed Jul- 30, 1906. Frank O. Loveland, Clerk.

No. 1578.

United States Circuit Court of Appeals, Sixth Circuit.

W. H. GAZLAY, H. F. GAZLAY, HULDA G. MILLER, EMMA G. DONALDSON, JULIA G. STEWART, and CLARA G. KUHN, Appellants,

vs.

FLETCHER R. WILLIAMS, Trustee in Bankruptcy of Harry D. Brown, Appellee.

Appeal from the District Court of the United States for the Southern District of Ohio.

Submitted June 15, 1906; Decided July 16, 1906.

Before Lurton and Severens, Circuit Judges, and Cochran, District Judge.

COCHRAN, District Judge, delivered the opinion of the court:

This appeal involves a controversy which arose in the course of the involuntary proceeding in bankruptcy against one Harry D. Brown, pending in the lower court. It is a controversy between the appellee, his trustee in said proceeding, and the appellants, who are lessors in a certain lease under which, at the time of the institution of said proceeding, said bankrupt held a certain leasehold estate.

The lease covered certain premises on the east side of Vine street, between Fifth and Sixth streets, Cincinnati, Ohio, known as the Majestic Café. It was executed July 16, 1902, was for a period of ten years from July 7, 1902, with the privilege of renewal for an additional ten years, and was upon an annual rental of $7,000,
35 payable monthly, to secure payment of which a lien was retained in the lease on the leasehold estate thereby granted. The original lessee was one Joseph D. Kueny, and the bankrupt acquired the leasehold estate by purchase at a judicial sale in a suit brought by appellants, lessors in said lease, against said Kueny in the Superior Court of Cincinnati to enforce said lien. Suit was brought April 9, 1904, and the sale was had and confirmed in June and July, 1905. Pending the suit the premises were in charge of a receiver. The petition in said suit sought a sale of the leasehold estate, "subject to the terms, covenants and conditions contained" in said lease, but the order of sale and confirmation contained no such provision. Said Brown, immediately upon his purchase, entered into possession, made extensive improvements on the property and paid the rent regularly until January 1, 1906. On January 17, 1906, said bankruptcy proceedings were instituted against him and on same date the appellee, Fletcher R. Williams, was appointed receiver therein. An

adjudication was had on February 19, 1906, and on February 27, 1906, appellee was elected trustee. Upon his appointment as receiver, appellee took possession of the premises and he has been in possession ever since, as receiver until February 27, 1906, and as trustee since then. On February 1, 1906, appellee as receiver paid the rent for the month of January, and on March 6, 1906, as trustee, he paid it for the month of February. Both payments were made to the appellant, W. H. Gazlay, who was acting as agent for all the lessors. Said leasehold estate was appraised as part of the assets of said bankrupt at the sum of $10,000. The controversy which arose in said proceeding concerned the leasehold estate in said premises under said lease held by appellee and in particular the character of his title thereto. The lease contained a provision in these words:

"Provided, however, that if said rent or any part thereof shall remain unpaid for — days after it shall become due without demand therefor; or if said lessee shall assign this lease or underlet said leased premises or any part thereof, or if said lessee's interest therein shall be sold under execution or other legal process without the written consent of said lessors, their heirs or assigns is first
36 had; or if said lessee or assigns shall fail to keep any of the other covenants of the lease by said lessee to be kept, it shall be lawful for said lessors, their heirs or assigns, into said premises to re-enter and the same to have again, repossess and enjoy as in their first and former estate, and thereupon this lease and everything contained on the said lessors' behalf to be done and performed shall cease, determine and be void."

It was not contended by appellants that said provision affected the passage of the leasehold estate from Kueny, the original lessee, to said Brown, by virtue of the proceedings in the Superior Court of Cincinnati, or its passage from said Brown to appellee upon his appointment as trustee, as of the date of the adjudication. But it was contended by them that a sale by appellee of said leasehold estate for the benefit of the creditors of said Brown would, because of said provision, operate as a forfeiture thereof, and that thereupon they would be entitled to enter and repossess themselves of the premises, and they seem to have notified appellee from the time of his appointment as receiver that they would not consent to such sale.

In view of this contention on the part of appellants, the appellee, on March 1, 1906, filed a written application in the lower court in said bankruptcy proceeding to have appellants brought before the court, the character of his title to said leasehold estate determined and it quieted from the adverse claims of the appellants. Subpœna issued upon the application and was served upon all of the appellants. They appeared and moved the court to dismiss the application for want of jurisdiction in it to so proceed against them and dispose of their claim. This motion and the merits of the controversy were referred to the referee, who upheld the jurisdiction of the court and decided against appellants' claim. The matter was then brought before the lower court by a petition for review, which confirmed the order of the referee and dismissed the petition. This appeal is from that action of the lower court.

No point is made here as to that court not having jurisdiction to so proceed against appellants and dispose of the controversy between them and appellee. It is well settled that it had such jurisdiction. Whitney *v.* Wenman, 198 U. S. 539.

37 Nor is any point made as to the appellee's right to have the validity of the appellants' claim heard and determined in advance of a sale by him of the leasehold estate. His application to that end was in the nature of a bill to remove a cloud on his title. Blair *v.* City of Chicago, 210 U. S. 400.

The arguments here relate solely to the merits of the controversy. The appellee maintains, on several grounds, that a sale by him of the leasehold estate for the benefit of creditors will not work a forfeiture thereof. He contends that this case comes within the rule laid down in Dumpor's case, 4 Coke 119*b* (1 Smith's Lead. Cases 15). That rule is that where a lease is upon a proviso that the lessee shall not alien without the special license of the lessors, if the license is once given, the condition is annulled, removed or destroyed, that is, has spent its force, so that it can have no effect on a subsequent alienation. Here the interest of Kueny, the original lessee, was sold to said Brown by the procurement of appellants. This, it is urged, exhausts the condition and brings the case within the rule stated. On the other hand, it is contended by appellants that their case is prevented from coming within the rule by the fact that in their petition in the State Court they sought a sale of the unexpired term of the leasehold estate, "subject, however, to the terms, covenants and conditions contained" in the lease.

It is to be noted in this connection that the sale that was had was one that was contemplated by the lease, in that a lien was retained therein on the leasehold estate created thereby to secure payment of the rent.

Appellee contends further that the acceptance of the rent for January and February from the appellee as receiver and trustee was a waiver of the right to claim a forfeiture in case of a sale by the appellee. In answer to this contention, it is urged by the appellants that appellee as trustee took title to the leasehold estate, the passage of the title thereto from the bankrupt to him not being affected by the condition in the lease, and therefore he had a right to pay the rent and appellants were bound to accept it.

The other ground relied upon by appellee is that a sale by him as trustee for the benefit of creditors is not forbidden by the
38 condition and will, therefore, not be a breach thereof, even though the case does not come within the rule in Dumpor's case. In other words, treating the case as if Brown were the original lessee and not the assignee of Kueny through judicial proceedings, such a sale is not so forbidden and hence will not be such a breach. It was on this last ground that the lower court placed its decision in favor of the appellee. Inasmuch as we think the lower court was correct in this position, it is not necessary for us to dispose of the other two grounds relied on.

Covenants against assignment and underletting contained in leases having the force of conditions are not favored by the courts.

Jones on Landlord *v.* Tenant Sec. 464, thus states the attitude of the courts towards such covenants:

"Covenants against assignment or underletting are not favorably regarded by the courts, and are liberally construed in favor of the lessees so as to prevent the restriction from extending any further than is necessary."

Judge Earl in the case of Riggs *v.* Pursell, 66 N. Y. 193, puts it more strongly. He says:

"Such covenants are restraints which courts do not favor. They are construed with the utmost jealousy and very easy modes have always been countenanced for defeating them."

This attitude of disfavor, however, does not permit resort to sophistical reasoning to read out of such a covenant that which it really contains. It simply requires that what is claimed to be within it shall be clearly and manifestly so, and that if there is a felt doubt as to its being within it, that it be excluded therefrom. The cases go very far towards holding that the mere letter of the covenant is controlling.

Illustrations of this attitude and how far it has led courts to go are abundant in the reported cases. As, for instance, it has been held that an underletting is not a breach of a covenant against assignment, Jackson *v.* Silvernail, 15 Johns. 277; that an assignment is not a breach of a covenant against underletting, Field *v.* Mills, 33
39 N. J. L. 254, though there are other cases holding to the contrary of this; that a sublease of a part of the premises is not a breach of a covenant against underletting the premises, Roosevelt *v.* Hopkins, 33 N. Y. 81; that placing one in charge of the leased premises as servant or care taker to look after it during the landlord's absence is not a breach of a covenant against assignment or subletting, Presby *v.* Benjamin, 166 N. Y. 377; that a mortgage of a leasehold interest and judicial sale under the mortgage is not a breach of a covenant against assignment, it being the law of New York where it was so decided that a mortgage is not a transfer of the legal title or the possession but a mere security, Riggs *v.* Pursell, *supra;* that a delivery of a lease or security for money loaned operating as an equitable mortgage of the term secured by the lease is not a breach of a covenant not to let, set, assign, transfer, set over or otherwise part with the premises devised in the lease, Doe *v.* Hogg, 4 Dowl & Ry., 266; that a sale under execution against the tenant is not a breach of a covenant against assignment or underletting, Farnum *v.* Hefner, 79 Cal. 575; that an assignment by an assignee appointed in voluntary proceedings in insolvency is not a breach of a covenant not to lease, underlet or permit any other person to occupy, Bemis *v.* Wilder, 100 Mass. 446; and that an assignment by one of two joint lessees is not a breach of a covenant against assignment by the lessee, Randol *v.* Scott, 110 Cal. 590.

Dumpor's case and those cases applying the rule laid down in it are likewise illustrations of this attitude and the extent to which it has taken the courts. Concerning this case, Jones on Landlord and Tenant, Sec. 471, says:

"In the United States the rule in Dumpor's case while subject to

some adverse criticism has generally been received as settled law, though in many of the cases where the topic arose no actual decision upon the precise point was necessary."

This brings us to the case in hand. It is not necessary to consider the condition in question further than it relates to the assignment of the leasehold estate. It prohibits both voluntary and involuntary assignments. In so far as it prohibits voluntary assignments
40 the language is "if said lessee shall assign this lease;" and in so far as it prohibits involuntary assignments the language is "or if said lessee's interest therein shall be sold under execution or other legal process."

It is certain that passage of the leasehold estate from the bankrupt Brown to the appellee as of the date of adjudication was not a breach of either branch of the condition. It was a passage by operation of law and not by the act of the bankrupt; and the passage was not through the medium of a sale. Indeed, it is not argued by appellants that such passage was a breach of the condition. On the contrary it is conceded that it was not and it is argued therefrom that the acceptance of the rent from the receiver and trustee was not an anticipatory waiver of a breach thereof by a sale by appellee for the benefit of creditors. This then being true, *i. e.* that the passage of the leasehold estate from the bankrupt to appellee was not prohibited by the condition, it would seem that a sale by the appellee for the benefit of the creditors is not prohibited thereby. It is hardly reasonable that the parties to the lease could have intended that such a passage was allowable and yet that a sale by appellee was not, at least, without specially providing that it was not. The sole purpose of the acquisition by the trustee in bankruptcy of the assets of the bankrupt is to reduce them to money and distribute the proceeds amongst the creditors; and he has no right to hold them for any other purpose except temporarily.

And a consideration of the language of the condition shows that a sale by appellee of the leasehold estate is not within its terms. It is not within the voluntary branch thereof, because if it may be said to be a voluntary assignment, it is not an assignment by "said lessee." It is not within the involuntary branch thereof, for though it may be said to be an involuntary assignment and, possibly also a sale under legal process it is not a sale of "said lessee's interest." It is a sale of the appellee's interest held by it for the benefit of creditors and which passed to it notwithstanding the condition, by virtue of the bankruptcy proceeding.

The case nearest to the one in hand which we have found is that of Doe *v.* Bevan, 3 M. & S. 353.
41 The covenant there was one that the lessee, his executors, administrators or assigns, would not assign the indenture or his or their interest therein, or assign the premises to any person whatsoever. The covenant was simply against voluntary assignment, but it took in not only the lessee but also his assigns. The lessee deposited this lease as security for money borrowed and became bankrupt and the lease was sold by direction of the chancellor to pay that debt. It was held that the assignees under the commis-

sion in bankruptcy might assign the lease to vendee without forfeiture. Lord Ellenborough said:

"The courts have construed it to mean voluntary assigns as *contra* distinguished from assigns by operation of law and further than that, that the immediate vendee from the assigns in law is not within the proviso; the reason of which is that the assignee in law cannot be incumbered with the engagements belonging to the property he takes, such as in this case, the carrying on the bankrupt's trade in the public house, which is a strong instance. In such cases, therefore, the law must allow the assignee to divest himself of the property and convert it into a fund for the benefit of creditors."

Le Blanc, J., said:

"There can be no doubt that the lessee might have relieved himself from all inconvenience by expressly providing in the lease that if the lessee should become bankrupt or shall deposit the lease with any one then the lease should be void."

And again:

"It is clear that there has been no assignment by the lessee himself; it is also clear that the lessee's becoming bankrupt is not a breach, but the assignees under the commission have assigned. They were bound to assign because they took only as trustees for the purpose of disposing of the property to the best advantage for the benefit of creditors; and they are compelled under the order of the court of chancery to sell it in discharge of the debt of Whitbread & Co."

Bayley, J., said:

"It has never been considered that the lessee's becoming
42 bankrupt was an avoiding of the lease within this proviso; and if it is not, what act has the lessee done to avoid it? All that has followed upon the bankruptcy is not by his act, but by operation of the law transferring his property to his assignees. Then shall the assignees have capacity to take it and yet not to dispose of it; shall they take it only for their own benefit or be obliged to retain it in their hands to the prejudice of the creditors for whose benefit the law originally cast it upon them? Undoubtedly that can never be."

Instances of where the covenants involved expressly covered the bankruptcy of the lessee as well as sales of his estate under execution or other legal process may be found in the following cases, to-wit: Davis *v.* Eyton, 7 Bing. 154; Doe *v.* David, 5 Tyrw. 126; *In re* Ells, 98 Fed. 967.

The action of the lower court is therefore affirmed.

43 And afterwards, to-wit: on the 8th day of November, A. D. 1906, a petition for appeal was filed in said cause clothed in the words and figures following, to-wit:

Petition on Appeal of W. H. Gazlay et al.

United States Circuit Court of Appeals, Sixth Circuit.

W. H. GAZLAY, HANNA F. GAZLAY, EMMA G. DONALDSON, HULDA G. MILLER, JULIA G. STEWART and CLARA G. KUHN, Appellants,

vs.

FLETCHER R. WILLIAMS, Trustee of Harry D. Brown, Bankrupt, Appellee.

Petition on Appeal of W. H. Gazlay; Hanna F. Gazlay; Hulda G. Miller; Emma G. Donaldson; Julia G. Stewart; and Clara G. Kuhn.

The above named W. H. Gazlay, Hanna F. Gazlay, Hulda G. Miller, Emma G. Donaldson, Julia G. Stewart, and Clara G. Kuhn, considering themselves aggrieved by the judgment made and entered on the 16th day of June, 1906, in the above entitled cause, do hereby appeal from said judgment to the Supreme Court of the United States for the reasons specified in the assignment of errors which is filed herewith, and they pray that this appeal may be allowed
44 and that a transcript of the record, proceedings and papers upon which said judgment was made, duly authenticated, may be sent to the Supreme Court of the United States.

OSCAR W. KUHN,
Attorney for Appellants.

The foregoing claim of appeal is allowed.

HORACE H. LURTON,
Senior Circuit Judge.

And afterwards, to-wit: but on the same day, an assignment of errors was filed clothed in the words and figures following, to-wit:

United States Circuit Court of Appeals, Sixth Circuit.

W. H. GAZLAY, HANNA F. GAZLAY, EMMA G. DONALDSON, HULDA G. MILLER, JULIA G. STEWART and CLARA G. KUHN, Appellants,

vs.

FLETCHER R. WILLIAMS, Trustee of Harry D. Brown, Bankrupt, Appellee.

Assignment of Errors.

Now comes W. H. Gazlay, H. F. Gazlay, Hulda G. Miller, Emma G. Donaldson, Julia G. Stewart and Clara G. Kuhn, the appellants herein, and having asked for the allowance of an appeal from the

decree herein against them, assign for errors in said decree
45 and the proceedings of the Court therein the following.

First. That the said Court erred in affirming the judgment of the District Court of the United States for the Southern District of Ohio, Western Division, ordering that the petition of the said W. H. Gazlay *et al.* to review the findings and orders of the Referee in Bankruptcy should be dismissed.

Second. That the Court erred in affirming the finding of the District Court of the United States for the Southern District of Ohio, Western Division, that the appellants had no right to forfeit the lease of said Harry D. Brown in the event of a sale of same under the application of the Trustee in bankruptcy herein because, he was not expressly named in the prohibition against alienation in said lease.

Third. That the Court erred in affirming the judgment of the District Court of the United States for the Southern District of Ohio, Western Division, that the appellants could not assert the right of forfeiture as against the trustee in bankruptcy herein because by their proceedings in the Superior Court of Cincinnati against
46 J. D. Kueny, the original lessee of the said premises, under which proceedings the said leasehold estate was sold to the said Harry D. Brown, they had forever discharged the lease from the condition providing for a forfeiture of the lease in case said leasehold interest should be sold on execution or other legal process without the written consent of the lessors, the appellants herein.

Fourth. That the Court erred in affirming the judgment of the District Court of the United States for the Southern District of Ohio, W. D., that the trustee in bankruptcy was entitled to sell said leasehold estate clear and free from and claim or right on the part of appellants to forfeit same in the event of a sale.

Wherefore these appellants pray that the finding and decree of the Court against them be reversed and held for naught and that the said Court may be directed and ordered to enter such a decree as is proper.

OSCAR W. KUHN,
Solicitor for Appellants.

47 And afterwards, to-wit: but on the same day an order was entered on the journal of said court clothed in the words and figures as follows, to-wit:

Journal C, Page 329.

No. 1578.

W. H. GAZLAY ET AL.
vs.
FLETCHER R. WILLIAMS, Trustee of Harry *P.* Brown, Bankrupt.

Petition for appeal to Supreme Court is submitted by Mr. Oscar Kuhn and the court took the same under advisement. And thereupon the appeal is hereby granted and bond fixed at the sum of $250.00.

And afterwards, to-wit on the 15th day of November, A. D. 1906 a bond was filed in said cause clothed in the words and figures as follows, to-wit:

Know all men by these presents, That we, W. H. Gazlay, H. F. Gazlay, Hulda G. Miller, Emma G. Donaldson, Julia G. Stewart and Clara G. Kuhn as principals, and Oscar W. Kuhn and Eugene C. Pociey, as sureties, are held and firmly bound unto Fletcher R. Williams, as Trustee in Bankruptcy of Harry D. Brown, a
48 bankrupt in the full and just sum of Two Hundred and Fifty Dollars ($250.00) to be paid to the said Fletcher R. Williams as Trustee aforesaid, his certain attorneys, executors, administrators or assigns: to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 15th day of November in the year of our Lord one thousand nine hundred and Six.

Whereas, lately at a session of the United States Circuit Court of Appeals for the Sixth Circuit, in a suit depending in said Court, between W. H. Gazlay, H. F. Gazlay, Hulda G. Miller, Emma G. Donaldson, Julia G. Stewart and Clara G. Kuhn as appellants and Fletcher R. Williams as Trustee of Harry D. Brown, a bankrupt, appellee, a decree was rendered against the said W. H. Gazlay, H. F. Gazlay, Hulda G. Miller, Emma G. Donaldson, Julia G. Stewart and Clara G. Kuhn and the said W. H. Gazlay, H. F. Gazlay, Hulda G. Miller, Emma G. Donaldson, Julia G. Stewart and Clara G. Kuhn having obtained an appeal and filed a copy thereof in the Clerk's office of the said Court to reverse the decree in
49 the aforesaid suit, and a citation directed to the said Fletcher R. Williams as Trustee aforesaid citing and admonishing him to be and appear at a session of the Supreme Court of the United States to be holden at the City of Washington, D. C. on the — day of —— next.

Now the condition of the above obligation is such, That if the said W. H. Gazlay, H. F. Gazlay, Hulda G. Miller, Emma G. Donaldson, Julia G. Stewart and Clara G. Kuhn shall prosecute their appeal to effect, and answer all damages and costs if they fail to

make their plea good, then the above obligation to be void; else to remain in full force and virtue.

W. H. GAZLAY,
H. F. GAZLAY,
HULDA G. MILLER,
EMMA G. DONALDSON,
JULIA G. STEWART,
CLARA G. KUHN,
By OSCAR W. KUHN,
Attorney in Fact.
OSCAR W. KUHN.
EUGENE C. POSIEY.

Sealed and delivered in the presence of—
——— ———.
——— ———.

Approved by—
HORACE H. LURTON,
Circuit Judge.

50 United States Circuit Court of Appeals for the Sixth Circuit.

UNITED STATES OF AMERICA, *Sixth Judicial Circuit, ss:*

To Fletcher R. Williams, Trustee in Bankruptcy of Harry D. Brown, Bankrupt, Greeting:

You are hereby cited and admonished to be and appear at a session of the Supreme Court of the United States, to be holden at the City of Washington, D. C., on the * 15 day of December next, pursuant to an appeal, filed in the Clerk's Office of the U. S. Circuit Court of Appeals, Sixth Circuit, wherein W. H. Gazlay, H. F. Gazlay, Hulda G. Miller, Emma G. Donaldson, Julia G. Stewart and Clara G. Kuhn are appellants and you are appellee, to show cause, if any there be, why the decree rendered against the said appellants as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 15th day of November, in the year of our Lord one thousand nine hundred and six, and of the Independence of the United States of America the one hundred and 31st.

HORACE H. LURTON,
Circuit Judge.

* Not exceeding 30 days from the day of signing.

51 CINCINNATI, OHIO, *November* 17, 1906.

Received this writ at Cincinnati, Ohio, on November 16, 1906, and on the same day served same on the within named Fletcher R. Williams, Trustee, etc. by leaving a true copy of this writ, with the

endorsement thereon, at his usual place of residence, in the hands of his wife,—at Cincinnati, Ohio.

EUGENE L. LEWIS,
U. S. Marshal, S. D. O.,
By W. J. SANDERSON, *Deputy.*

Fees.

1 service	$2.00
1 copy	.30
2 miles	.12
Total	$2.42

Marshal's Civil Docket No. 3897.

52 United States Circuit Court of Appeals for the Sixth Circuit.

I, Frank O. Loveland, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing is a true and correct copy of the record and proceedings together with the original citation in the case of W. H. Gazlay, *et al. vs.* Fletcher R. Williams, Trustee, No. 1578, as the same remains upon the files and records of said United States Circuit Court of Appeals for the Sixth Circuit, and of the whole thereof.

In testimony whereof, I have hereunto subscribed my name, and affixed the seal of said Court, at the City of Cincinnati, Ohio, this 19th day of November A. D. 1906.

[Seal United States Circuit Court of Appeals, Sixth Circuit.]

FRANK O. LOVELAND,
Clerk of the United States Circuit Court of Appeals for the Sixth Circuit.

Endorsed on cover: File No. 20,478. U. S. circuit court appeals, 6th circuit. Term No. 513. W. H. Gazlay, Hanna F. Gazlay, Hulda G. Miller *et al.*, appellants, *vs.* Fletcher R. Williams, trustee of Harry D. Brown, bankrupt. Filed December 6, 1906. File No. 20,478.